Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 634.

FREEDOM HUTCHINSON, Trustee, Appellant,

v.

OTIS, WILCOX & COMPANY, Appellees.

Brief for the Appellant in Opposition to the Motion to Dismiss.

Statement of Facts.

The facts material to this motion to dismiss are as follows: E. C. Hodges & Company, stockbrokers in Boston, were adjudicated bankrupts April 27, 1900, and Freedom Hutchinson, the appellant, was appointed trustee of their estate. Prior to the aforesaid adjudication, the appellees, Otis, Wilcox & Company, were creditors of Hodges & Company, and had begun suit against the bankrupts in New York, and had garnisheed Post & Flagg of that city as debtors of Hodges & Company.

After the adjudication in bankruptcy, the appellees continued to prosecute their suit in New York, got a judg-

ment, took out execution, and were paid by Post & Flagg. The judgment was entered on the record as satisfied in compliance with the New York statute. The garnishment was, in fact, vacated by the bankruptcy proceedings, because suit was begun less than four months before the beginning of bankruptcy proceedings. The trustee demanded payment from Post & Flagg of the amount due from them to the estate of E. C. Hodges & Company before they made payment to the officer on execution. When Post & Flagg paid over the money to Otis, Wilcox & Company they took a bond from the latter to indemnify them.

E. C. Hodges had a seat in the New York stock exchange, which was sold after the bankruptcy, and after the payment by Post & Flagg, above referred to. Otis, Wilcox & Company were also members of the New York exchange, and under the rules had a right to take such action as would establish a lien on the proceeds of the seat for debts due from the bankrupts to them.

This lien was never in fact perfected in the manner required by the aforesaid rules, and Otis, Wilcox & Company wrote a letter relinquishing whatever right they had against the Hodges' seat, in the belief that they had made a full settlement. The proceeds of the seat, after payment of certain claims, came to the trustee in bankruptcy.

The trustee never made any claim upon Otis, Wilcox & Company on account of the money received from Post & Flagg, but began a suit against Post & Flagg, who called on Otis, Wilcox & Company to defend, under the bond of indemnity. Counsel for Otis, Wilcox & Company agreed with the trustee to settle the latter's suit against Post & Flagg, by paying the money due by Post & Flagg to the trustee, — not the money which had been paid by Post &

Flagg to Otis, Wilcox & Company, — and the trustee took such payment in full settlement of his suit against Post & Flagg.

Otis, Wilcox & Company thereupon applied to the court of bankruptcy to be admitted as creditors against the estate of Hodges & Company, and also petitioned that they be paid the proceeds of the New York stock exchange seat which had come to the hands of the trustee. The proof of claim first filed by Otis, Wilcox & Company was defective in some particulars, and a substituted proof of claim was allowed by the district court, more than one year after the adjudication, and also after the case had been taken by appeal from the district court.

The district court allowed the appellees to prove as creditors, although the record of the New York case was set up as a bar by the trustee, and also ordered the trustee to pay to them the proceeds of the stock exchange seat in his hands. The trustee appealed to the Circuit Court of Appeals, where the following findings of law were made: —

First. That the appellees' proof of claim should be allowed in manner and form as set forth in the decree of the district court.

Second. That the substituted proof of claim presented by the appellees was properly allowed by the district court.

Third. That the part of the decree of the district court ordering that the trustee should pay to the appellees, Otis, Wilcox & Company, the sum of four thousand ninety-one and 28/100 dollars ($4091.28) on account of their claim, is not subject to an appeal to the Circuit Court of Appeals, and is not open for revision by that court on the

appeal taken by the trustee from the allowance of the claim.

The trustee has appealed to this court from the decree of the Circuit Court of Appeals, and seeks to have the above findings of law reviewed here.

Argument.

I.

First Finding of Law.

On this finding the trustee is clearly entitled to an appeal under section 25, paragraph *b* (1), of the bankruptcy act of July 1, 1898, for the following reasons: —

First. There has been a final decision of a court of appeals allowing a claim under this act.

Second. The amount in controversy exceeds the sum of $2000.

Third. A right, privilege, or immunity has been claimed under the Constitution and statutes of the United States, and the decisions of the courts below have been against the right, privilege, or immunity relied upon, thus involving a question which might have been taken on writ of error from the highest court of a state to the Supreme Court of the United States.

If Otis, Wilcox & Company had undertaken to enforce their claim for a second time in a state court, they would have been met there, as they have been confronted in these bankruptcy proceedings, with the record of satisfaction in the New York court.

The New York Code of Civil Procedure, sec. 1264, provides that —

"where an execution is returned wholly or partly satisfied, the clerk must make an entry of the satisfaction or partial satisfaction in the docket of the judgment upon which it was issued. Thereupon the judgment is deemed satisfied to the extent of the amount returned as collected, unless the return is vacated by the court."

Such a return was made in the case at bar in the docket of the judgment recovered in New York. (Record, p. 45.)

On account of the above provision of statute, said record of satisfaction duly set up would have been a bar in the courts of New York to any further action upon the judgment by Otis, Wilcox & Company, or upon the claim upon which such judgment was based, so long as the record entry remained unchanged.

Taylor v. *Ranney*, 4 Hill, 619.
Dundee Nat. Bank v. *Wood*, 30 N.Y. St. Rep. 608.
Todd v. *Botchford*, 86 N.Y. 517.
Crotty v. *McKenzie*, 10 Jones & Spencer, 192, 201.

The fact that bankruptcy proceedings intervened while the action begun in New York by Otis, Wilcox & Company against the bankrupts was still pending, did not affect the New York proceedings, nor in any way nullify the records made in that court.

Eyster v. *Gaff*, 91 U.S. 521.

Article iv., section 1, of the Constitution of the United States, and Rev. Sts. c. 17, sec. 905, require that such

record of satisfaction duly set up shall have the same force and effect that it had in New York, in all courts, both state and federal, within the United States.

Mills v. *Duryee*, 7 Cranch, 481.

The courts below have denied the trustee this right given him by the Constitution and statutes of the United States, and for that reason he is entitled to bring the case to this court for review.

It is argued by the appellees that it does not sufficiently appear from the record before this court that the federal question involved was raised and decided in the court below.

Since the proceedings in this case have taken place wholly in the federal courts, which are cognizant of constitutional provisions and acts of Congress, without special reference thereto, it may well be argued that it is not necessary to set out in the record before this court the federal question involved with the technical exactness required in cases coming from a state court on writ of error.

However that may be, an inspection of this record clearly shows that the question above set forth did arise in the case at bar, and that the courts below could not have reached the conclusion and judgment which they did without passing upon the federal question involved.

The record shows the following facts: Otis, Wilcox & Company were at one time creditors of Hodges & Company (Record, p. 40); judgment was obtained in New York by Otis, Wilcox & Company against Hodges & Company, and funds were paid over on execution, and record entries were made showing satisfaction of the execution. (Record, p. 42.) The entries of satisfaction were made

in conformity to the New York statute, which provided that such entries should be conclusive as to the satisfaction of the judgments so long as the records remained unchanged. (Record, p. 45.) Subsequently, Otis, Wilcox & Company filed a petition in the court of bankruptcy, praying that they be admitted as creditors against the estate of Hodges & Company on account of the claim for which they had already obtained judgment and satisfaction. (Record, p. 3.) *The trustee objected to the granting of said petition on the ground that the court record showed the judgment had been satisfied, and that Otis, Wilcox & Company were no longer creditors.* (Record, p. 18.)

In the court below there were no formal pleadings by the trustee. The question was decided on an agreed statement of facts presented to the court, that statement of facts setting up the record of satisfaction and the New York statute in conformity to which it was entered, together with the certificate of the referee setting forth the claim of the trustee, makes it perfectly plain what was the question involved and passed upon in the courts below, and what was the right claimed by the trustee.

Specific mention of the constitutional provision or of the United States statute was not required. Federal courts would be cognizant of them.

> GRAY, J., in *Spencer* v. *Merchant*, 125 U.S. 345.

Nor is it necessary that the federal question should be set out in the pleadings.

> *Furman* v. *Nichol*, 8 Wall. 44, 56.
> *Murray* v. *Charleston*, 96 U.S. 432.

Nor must it be stated in the opinions of the courts below that they formally passed upon it.

Roby v. *Colehour*, 146 U.S. 153, 159.

The requirements of the statute governing writs of error from state courts are fulfilled if this court can see from the whole record that a certain provision of the Constitution or act of Congress was relied on, and that the right thus claimed was denied.

Bridge Proprietors v. *Hoboken Co.*, 1 Wall. 116.
Furman v. *Nichol*, 8 Wall. 44.
Murray v. *Charleston*, 96 U.S. 432.
Roby v. *Colehour*, 146 U.S. 153.

The record in the case at bar sufficiently shows that such a right was claimed and denied.

The case of *Pirie* v. *Chicago Title and Trust Co.*, 182 U.S. 438, came before this court on appeal from the Circuit Court of Appeals, and was here decided on its merits.

As far as appears from the record there was in that case no special federal question involved and raised which might have been carried from a state court on a writ of error, as in the case at bar. Jurisdiction was apparently taken by this court because there was a controversy in the court of bankruptcy over the allowance of a claim of more than $2000. No doubt that in itself raised a federal question sufficient to comply with the requirements of section 25, paragraph *b* (1), of the bankruptcy act.

The Pirie case, therefore, seems to be a controlling authority for the appeal here taken.

II.

Second Finding of Law.

The material facts bearing on the question involved in the second finding of law are as follows: Hodges & Company were adjudicated bankrupts April 27, 1900. (Record, p. 7.) On March 9, 1901, Otis, Wilcox & Company filed in the bankruptcy court a proof of claim against the estate of Hodges & Company. (Record, p. 3.) This proof of claim did not conform to the requirements of section 57*a* of the bankrupt act, nor with general order XXI. (See opinion of PUTNAM, J., Record, p. 27.)

On August 1, 1901, the case was certified by the referee to the judge of the district court, and on November 4, 1901, said judge entered his decree in the matter. (Record, p. 22.)

The trustee appealed from the decree of the district court; his appeal was allowed on November 6, 1901 (Record, p. 22), and the citation issued on the same date. (Record, p. 23.) The trustee was not obliged to give an appeal bond. (Bankrupt Act, sec. 25*c*.)

On November 12, 1901, the judge of the district court allowed another proof of claim to be substituted as of November 4, 1901, in place of the defective proof above referred to. (Record, p. 4.)

It should be noticed that this substitution was made more than one year after the adjudication in bankruptcy, and also after the case had been removed by appeal from the district court.

The allowance of this substituted proof of claim after the expiration of a year from the time of adjudication was plainly prohibited by the bankrupt act, section 57*n*.

In re Moebius, 116 Fed. Rep. 47.

This ground of objection was set up by the trustee, and the Circuit Court of Appeals expressly decided against him on that point. (Record, p. 29.)

The proper construction of section 57*n* of the bankrupt act being thus brought in question, the trustee is entitled to have the matter reviewed by this court on appeal.

It is also plain that the district court had no power or right to allow the substitution on November 14, 1901.

The trustee's appeal was perfected on November 6, 1901, and the case was then removed from the district court. It was not within the power of the judge of the district court to allow amendments or pass orders in regard to a case which was no longer in his court.

Draper v. *Davis*, 102 U.S. 370.
Keyser v. *Farr*, 105 U.S. 265.

Because an important question is here raised, involving the construction of section 57*n* of the bankrupt act, upon which at least one decision has been made at variance with that of the courts below (*in re Moebius*, 116 Fed. Rep. 47), and in view of the fact that the district court was apparently without power to allow the substitution here complained of, it is obvious that this court should not grant the request of the appellees to affirm the decision of the Circuit Court of Appeals under the provisions of rule 6.

The question is not a trifling one, as stated on the brief of the appellees.

When the first proof of claim was made by Otis, Wilcox & Company, March 9, 1901, they had received payment of their debt from Post & Flagg, and by no possibility were then creditors of Hodges & Company. Their proof of claim was therefore a nullity, aside from being fatally defective in form.

The whole right of the appellees to prove as creditors against this estate depends, therefore, upon the validity of the allowance of the substituted claim, which was not presented to the court until more than a year after the adjudication.

Certainly the correctness of the decision below on this point raises a question of substantial doubt, and it would be unfair for this court to affirm the decree of the Circuit Court of Appeals without giving the appellant the opportunity of being heard on the matter.

III.

Third Finding of Law.

The question involved in the third finding of law was properly before the Circuit Court of Appeals by appeal, and the finding on this point was erroneous.

The question of priority in payment, or of the validity of a lien claimed by a creditor who has a provable debt, is an incident of the allowance of the claim, and reviewable by the Circuit Court of Appeals on an appeal from such allowance.

Cunningham v. *Bank*, ~~10~~ 3 Fed. Rep. 932; (s.c.) 4 Am. B. Rep. 192.

The question would therefore be reviewed by this court in connection with the appeal from the allowance of the proof of claim.

Aside from the above suggestion, there is another independent ground upon which the trustee was clearly entitled to have considered on his appeal the question of payment of the proceeds of the stock exchange seat to Otis, Wilcox & Company.

The petition filed in the bankruptcy court by Otis, Wilcox & Company, praying that the proceeds of the seat be paid to them, was in its nature an intervening petition to reach a fund in the registry of the court.

Krippendorf v. *Hyde*, 110 U.S. 276, 285.
Hinckley v. *Gilman &c. Ry. Co.*, 94 U.S. 467.
Van Norden v. *Morton*, 99 U.S. 378.
Williams v. *Morgan*, 111 U.S. 684.
Gumbel v. *Pitkin*, 113 U.S. 545.
Gumbel v. *Pitkin*, 124 U.S. 131, 145.

Such a proceeding is independent of the bankrupt act, and appeals are governed by the general provisions of the judiciary act of March 3, 1891. Under the sixth section of that act there is a plain right of appeal to the Circuit Court of Appeals and to this court.

The provisions of the bankrupt act in regard to appeals do not in any way limit the scope of the act of 1891.

Elliott v. *Toeppner*, 187 U.S. 327, 334.

And even when the question arises in the bankruptcy court, the right of appeal to this court from the Circuit Court of Appeals is not limited to the cases enumerated in section 25, paragraph *b* (1), of the bankrupt act.

Page v. *Edmunds, Trustee*, 23 Sup. Ct. Rep. 200.

Since the appellant has been aggrieved by the third finding of law, his appeal on this point should be sustained.

Respectfully submitted,
FREEDOM HUTCHINSON, Trustee.
FREDERICK D. McKENNEY.